

each station has its own editorial staff, and they do not share any common editorial employees.<sup>117</sup>

The leadership for the *Post*'s editorial decision-making team consists of Paul Carlucci, the Publisher, Col Allan, the Editor-in-Chief, and Jesse Angelo, the Managing Editor. The various section editors of the paper (who oversee the reporters, editors, photographers and the rest of the newsgathering staff) report to Mr. Angelo or Mr. Allan, who in turn reports to Mr. Carlucci. WNYW(TV)'s editorial staff is led by Vice President and News Director Dianne Doctor. WWOR-TV's newsroom operations are led by Vice President and News Director James Driscoll. Both Ms. Doctor and Mr. Driscoll have their own assistant news directors, and each has a separate staff of producers, editors, writers, photographers, reporters and anchors. The *Post* is headquartered at 1211 Avenue of the Americas in New York City; WNYW(TV) is based in a separate building in the City at East 67<sup>th</sup> Street. WWOR-TV is based in its Secaucus, New Jersey facility. The editorial decision-making team at the *Post* does not maintain any oversight over the news operations of the stations and vice versa. Moreover, the news staffs at each outlet do not consult with one another about the selection of news. Each outlet decides for itself what

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<sup>117</sup> Occasionally, when both WNYW(TV) and WWOR-TV decide to cover an event that each separately has deemed to be newsworthy for its viewers, the stations will rely upon a single news gathering crew from one of the stations in order not to duplicate efforts. Even in such circumstances, each station still makes its own decision about whether to air the material that has been gathered and how prominently to feature the material on its newscasts. See *2008 Report & Order*, ¶ 71 ("maintaining editorial independence does not mean that a combination will be unable to take advantage of the potential opportunity for additional newsgathering that cross-ownership may provide or require that the outlets abstain from sharing some newsgathering inputs").

stories to air or publish and how prominently to air or display them.<sup>118</sup> The news coverage and emphasis, in fact, vary widely from one outlet to the others.<sup>119</sup>

News Corp and FTS have operated the *Post* and each station with independent editorial staffs at all times since the outlets have been under common ownership. If the Commission grants a waiver permitting continued ownership of these media, News Corp and FTS are entirely committed to maintaining full separation between the newspaper and the broadcast stations when it comes to selecting the news and formulating editorial positions. Even though the stations may share newsgathering resources from time to time, they will remain independent when it comes to exercising news judgment. Thus, common ownership of WNYW(TV), WWOR-TV and the *Post* will have no impact whatsoever on viewpoint diversity in the New York market. Indeed, as described above, the common ownership of these properties has *enhanced* viewpoint diversity by ensuring the preservation of the *Post* as a unique voice in the market.

(3) *Market Concentration.* The 2008 *Report & Order* indicates that the Commission wants to ensure that a combination of media outlets will not have undue impact on competition in a market.<sup>120</sup> In evaluating this factor, the FCC said that it will “conduct a fact-specific inquiry into the characteristics of the market in question as well as characteristics of the proposed combination.”<sup>121</sup> In particular, the Commission said

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<sup>118</sup> See Exhibit C.

<sup>119</sup> For example, the Commission itself found as part of the proceeding leading to the 2003 *Biennial Review Order* that the *Post* and WNYW(TV) presented diverse views during the 2000 presidential election. See 2003 *Biennial Review Order*, ¶ 361 (citing MOWG Study No. 2).

<sup>120</sup> 2008 *Report & Order*, ¶ 72.

<sup>121</sup> *Id.* ¶ 73.

that it will look at the number of independent voices that would remain in the market after the combination as well as “the relative power and influence of those voices and the outlets that the applicant proposes to own.”<sup>122</sup>

Here again, because News Corp and FTS have commonly owned the *Post*, WNYW(TV) and WWOR-TV for nearly 8 years, the Commission easily can discern that the combination of these outlets in the New York market has been no cause for alarm. Indeed, as demonstrated by Dr. Fratrik’s report, even with News Corp’s and FTS’ common ownership – and even using a market definition that overstates the companies’ market share – the New York market remains unconcentrated.<sup>123</sup>

Aside from Dr. Fratrik’s HHI analysis, even a cursory review of the competition that characterizes the New York DMA confirms that News Corp’s and FTS’ common ownership cannot possibly result in any competitive harms (or threats to diversity). The *Post* is but one of five major daily newspapers serving the market, and its share of advertising revenues in the DMA ranks last among the five.<sup>124</sup> The paper reaches less than 8 percent of the households in the DMA on an average day, and it also faces strenuous competition from other periodicals, broadcast stations and the Internet.<sup>125</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> See Fratrik Report, at 3-4. Dr. Fratrik’s analysis is based on a measurement of the market’s HHI, using the same methodology employed by the Department of Justice Merger Guidelines. As the Commission noted in the *2008 Report & Order*, even Consumers Union and the Consumer Federation of America (two entities that generally oppose common ownership of media outlets) suggested the use of the Justice Department’s HHI approach. See *2008 Report & Order*, ¶ 73.

<sup>124</sup> See Exhibit A, at Table 9.

<sup>125</sup> See *id.* at Tables 1-12.

Nor can WNYW(TV) and WWOR-TV be considered in any way dominant in the market. WNYW(TV), for instance, has had ratings ranging anywhere from 1.6 to 2.6 over the past year, which amounts to a share of no more than 6 percent of the households in the New York DMA. WWOR-TV's ratings for the past year have hovered just under 1.0, or approximately a 2 percent share. In comparison, WABC(TV) has had ratings typically exceeding 4.0, and shares as high as 10.5 percent. WCBS(TV) and WNBC(TV) similarly have ranged from 2.2 to 3.5, with shares as high as 8.6 and 6.9 percent, respectively. Moreover, due the competitive pressures and consumer fragmentation challenging all media today, WNYW(TV) and WWOR-TV both have suffered substantial ratings and share declines since 2001 (when both stations posted shares of at least 5 percent of the market's households).<sup>126</sup>

Even with the common ownership of WNYW(TV), WWOR-TV and the *Post*, there remains 18 independently-owned television stations, more than 100 independently-owned radio stations and about two dozen daily newspapers operating in the New York market, including several with significant power and influence.<sup>127</sup> As noted above, WABC(TV) regularly captures more than 10 percent of the New York television audience, and 8 daily newspapers have circulations in the DMA exceeding 100,000 readers. By any metric or criteria, it is evident that the News Corp/FTS combination does not come remotely close to dominating the New York market, and the combined entity cannot possibly have an adverse impact on competition in this unconcentrated DMA.

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<sup>126</sup> See *id.* at Table 11.

<sup>127</sup> See *id.* at Tables 1, 4-5.

(4) *Financial Distress*. The Commission expressed in the *2008 Report & Order* that it is cognizant of the “significant turmoil” roiling the newspaper industry today, and indicated that it will therefore take into consideration whether a newspaper proposed for combination with broadcast outlets is undergoing “financial distress” (a term that the Commission does not precisely define).<sup>128</sup> The FCC is right to be concerned. There is no shortage of publicly available data and reporting documenting the severe plight facing American newspapers, especially those in large cities. The New York market is no exception, nor has the *Post* itself been immune to the struggles facing the industry. Indeed, the *Post* is by any definition of the term mired in serious financial distress, as more fully described below.

The *2008 Report & Order* recited no shortage of reports focusing on the financial challenges that have caused newspapers such distress.<sup>129</sup> Even in the few months since the Commission compiled the record of the quadrennial review proceeding, the outlook for the industry has continued to worsen as the overall American economy reels in the face of high energy prices and the housing and financial markets crises. One recent report found that print advertising revenue at American newspapers declined by \$83 million between July 2006 and 2007 – an amount that vastly outpaces much smaller on-line advertising gains.<sup>130</sup> Advertising revenues at papers large and small continue to

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<sup>128</sup> *2008 Report & Order*, ¶ 74.

<sup>129</sup> *See id.* ¶¶ 27-33; 74.

<sup>130</sup> *See* Henry Blodget, *Death By Month: Tracking the Newspaper Industry's Decline*, Silicon Alley Insider, Aug. 27, 2007, [http://www.alleyinsider.com/2007/8/death\\_by\\_month\\_](http://www.alleyinsider.com/2007/8/death_by_month_).

shrink by significant amounts.<sup>131</sup> The Audit Bureau of Circulations (“ABC”) reported that circulation also continues to decline across the country; the figures for the six months ending March 31, 2008 show that subscriber losses are in fact accelerating.<sup>132</sup>

Widespread reports have confirmed that the *Post* itself is highly unprofitable, losing an estimated \$50 million each year (with losses accumulating for a number of years running).<sup>133</sup> The exact financial results of the *Post* contain competitively sensitive information, which News Corp is wary of submitting as part of a public document given the adverse competitive impact that could result if the *Post*’s rivals gain access to such information. If the Commission thinks it is necessary, however, News Corp would be willing to provide detailed financial reports confirming that the *Post* has consistently lost money for a number of years, subject to an appropriate protective order that would ensure confidential treatment of the information. In any case, there can be no doubt that while the industry at large is stumbling amidst radically falling *profits*, the

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<sup>131</sup> See Katharine Q. Seelye, *Drop in Ad Revenue Raises Tough Questions for Newspapers*, N.Y. Times, Mar. 26, 2007, at C2.

<sup>132</sup> See Louis Hau, *Timber! Newspaper Circulation Falls Again*, Forbes.com, Apr. 28, 2008, [http://www.forbes.com/2008/04/28/newspapers-circulation-advertising-biz-media-cx\\_lh\\_0428newspapers.html](http://www.forbes.com/2008/04/28/newspapers-circulation-advertising-biz-media-cx_lh_0428newspapers.html).

<sup>133</sup> See Tim Arango, *As News Corporation Posts Wide Gains, Murdoch Keeps His Sights on Newsday*, N.Y. Times, May 8, 2008, at C3 (“Mr. Murdoch has set his sights on *Newsday* because he sees it as a way to eliminate losses at *The New York Post*, a News Corporation property that loses an estimated \$50 million a year”); see also Anthony Bianco, *New York Post: Profitless Paper in Relentless Pursuit*, Bus. Wk., Feb. 21, 2005, at 71; *Publisher Murdoch’s U.S. Track Record*, Journalism.org (Aug. 1, 2007), <http://journalism.org/node/6757> (last visited June 23, 2008).

*Post* is actually *losing* money.<sup>134</sup> Moreover, the ABC reported that the *Post*'s daily circulation has fallen by more than 3 percent in the last six months alone, and the Sunday edition experienced an even more precipitous 8.6 percent decline.<sup>135</sup>

The 2008 *Report & Order* also pointed out that where a waiver applicant invokes "financial distress," the FCC will "look for evidence of the owner's commitment to invest significantly in newsroom operations as a result of a proposed combination."<sup>136</sup> Once again, because News Corp and FTS have owned the *Post* and broadcast stations in New York for a number of years, the Commission should evaluate this standard in light of the substantial investment in newsroom operations that the companies already have made in the market. Those investments, which are summarized throughout this pleading and in the Modification Petition, include the construction of a \$300 million printing facility, the expansion of editorial resources to create a new Sunday edition for the *Post*, and the commitment to increases in news, public affairs and other vital local programming on WNWY(TV) and WWOR-TV. Perhaps most importantly, common ownership literally enabled the preservation of the *Post* as a voice capable of contributing to the diversity of the New York market. Absent grant of the permanent waiver requested

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<sup>134</sup> See 2008 *Report & Order*, ¶ 74 (the FCC "may assess the reasonableness" of a claim of financial distress by "comparing data regarding the newspaper's . . . expenses with industry averages").

<sup>135</sup> See Harrington, *supra* note 73. The *Post*'s modest circulation gains in previous years had largely been attributable to the paper's decision to cut its newsstand price in half – to 25 cents – in the year 2000. Financial pressures, however, compelled the *Post* to restore its price to 50 cents in the Spring of 2008. The ABC's most recent statistics likely foreshadow additional downward pressure on the *Post*'s circulation figures as the market digests the price increase.

<sup>136</sup> 2008 *Report & Order*, ¶ 75.

herein, News Corp simply cannot justify making further investments in the paper, and the *Post*'s future ability to compete and contribute will again be placed in doubt.

In light of the tremendous challenges facing the newspaper industry, the Commission appropriately decided to take financial distress into account when reviewing waiver requests. In particular, the FCC noted that it "seek[s] to maintain the vitality of media voices and ensure their continued service to the public. To the extent that our [NBCO rule] forecloses a viable avenue for a struggling paper or a broadcast station to prevent the loss of a source of local programming, our rule would be undermining, rather than promoting, our goals of competition, localism and diversity."<sup>137</sup> For these very reasons, the Commission should grant News Corp's and FTS' waiver request, as a forced divestiture of the *Post* almost certainly would lead to the loss of a local outlet for New York news and information, in contravention of the FCC's longstanding policy goals.

**IV. BECAUSE THE NBCO RULE IS NOT NECESSARY TO PROMOTE DIVERSITY, LOCALISM OR COMPETITION, ANY COMPELLED DIVESTITURE OF THE *POST* WOULD VIOLATE NEWS CORP'S FIRST AMENDMENT RIGHTS**

The Commission itself has now reaffirmed its conclusion that the NBCO rule is unnecessary to serve its policy objectives of diversity, localism and competition.<sup>138</sup> In fact, the information contained herein and in the Modification Petition provides compelling evidence that application of the rule to the *Post* would in fact harm the public interest by threatening the future of the oldest daily newspaper in the United States.

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<sup>137</sup> *Id.* ¶ 74.

<sup>138</sup> *See id.* ¶¶ 18-19.



Contrary to the original unsupported Commission predictions that formed the basis for the NBCO rule, the Commission now recognizes that cross-ownership in large markets not only poses no threat to diversity, it actually leads to increased local news coverage and diversity.<sup>139</sup> The *NCCB* and *Red Lion* court decisions presumed that limiting a broadcasters' speech rights could be justified by the "First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources."<sup>140</sup> Given the Commission's affirmation of its findings regarding diversity and localism, however, the rule can no longer survive even rational basis constitutional scrutiny.

Even if the *NCCB* standard, which only requires careful examination of an ownership rule affecting speech,<sup>141</sup> were still controlling, the NBCO rule is not reasonable under that framework given the conclusions of the *2003 Biennial Review Order* and the *2008 Report & Order*. In fact, though, a heightened level of scrutiny is required because the scarcity rationale that led the *NCCB* Court to apply the lesser "reasonableness" standard has now been discredited.<sup>142</sup> The FCC suggested as much in

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<sup>139</sup> See *id.* ¶¶ 46, 49, 55.

<sup>140</sup> See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) ("*NCCB*") (internal quotation marks omitted); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("*Red Lion*").

<sup>141</sup> See *NCCB*, 436 U.S. at 796-97.

<sup>142</sup> See, e.g., Telecommunications Act of 1996, § 202(a)-(h) (relaxing many media ownership regulations); *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (finding that it would be "arbitrary and capricious if [the FCC] refused to reconsider [the NBCO rule] in light of persuasive evidence that the scarcity rationale is no longer tenable"); *In re Complaint of Syracuse Peace Council*, Order, 2 FCC Rcd 5043, ¶ 65 (1987) (noting that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press").

its *1998 Biennial Review Order*, which concluded that the *O'Brien* intermediate scrutiny standard of review was controlling.<sup>143</sup>

The Commission noted that “it is well-established that a content-neutral regulation, such as the [NBCO rule], will be sustained against claims that it violates the First Amendment if: 1) it advances important governmental interests unrelated to the suppression of free speech; and 2) does not burden substantially more speech than necessary to further those interests (the ‘*O'Brien* test’).”<sup>144</sup> The Commission has now specifically concluded that the NBCO rule is not needed to advance the government’s key policy objectives. Accordingly, failure to modify the permanent waiver to include WWOR-TV would violate the First Amendment.

## V. CONCLUSION

Given the abundant diversity and intense competition that characterize the New York media market, the time has come for the Commission to modify News Corp’s and FTS’ permanent waiver of the NBCO rule to permit common ownership of WNYW(TV), WWOR-TV and the *Post*. As News Corp has made clear since 2001, the NBCO rule should not even be applied to ownership of a newspaper and two television stations, so long as the combination complies with the local TV ownership rule. In any case, whether analyzed pursuant to the long-pending Modification Petition or in light of the new four factor test, there simply can be no question that common ownership of these three outlets in a market as diverse and competitive as New York poses no harm to the

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<sup>143</sup> See *1998 Biennial Review Report*, 15 FCC Rcd ¶¶ 115-117.

<sup>144</sup> *Id.* ¶ 116 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)).

public interest. Rather, as demonstrated herein, it has been common ownership that has preserved the *Post* as a unique voice in the market.


Absent the certainty that would be provided by modification of the permanent waiver to cover all three outlets, News Corp cannot rationally continue to invest in the *Post*, and the paper's very survival will again be placed in doubt. In a market with literally hundreds of independently-owned media outlets competing vigorously for consumers' attention, there is no reason for the Commission to place the future of the *Post* in jeopardy, and there is no justification for denying News Corp's and FTS' request for relief from the NBCO rule.

Respectfully submitted,

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Their Attorneys

Dated: June 23, 2008

# Fox Television Stations, Inc. Privilege Log

Document Number	Type	From	From or Custodian	CO	Date	Description	Privilege
1	Email	Sher, Jared	O'Connell, Maureen		9/2/2009	Email string regarding draft document regarding WWOR-TV	Attorney-Client; Attorney Work Product
2	Email	Walsh, Deborah	O'Connell, Maureen		9/2/2009	Email string regarding draft document regarding WWOR-TV	Attorney-Client; Attorney Work Product
3	Email	O'Connell, Maureen	Sher, Jared	Bush, Antoinette	9/2/2009	Email transmitting draft document regarding WWOR-TV	Attorney-Client; Attorney Work Product
4	Email	O'Connell, Maureen; Regan, Michael; Bush, Antoinette; Sher, Jared	O'Connell, Maureen	Di Scipio, Joseph	9/22/2009	Email string transmitting draft talking points for meetings with government officials	Attorney-Client; Attorney Work Product
5	Email	O'Connell, Maureen	Sher, Jared	Bush, Antoinette	9/24/2009	Email transmitting draft document regarding WWOR-TV	Attorney-Client; Attorney Work Product
6	Document		O'Connell, Maureen		9/23/2009	Briefing book, prepared at the direction of counsel, for meetings with government officials	Attorney-Client; Attorney Work Product
7	Document		O'Connell, Maureen		On or before 9/23/09	Draft of talking points, prepared at the direction of counsel, for meetings with government officials	Attorney-Client; Attorney Work Product
8	Document		O'Connell, Maureen		On or before 9/23/09	Draft of talking points, prepared at the direction of counsel, for meetings with government officials	Attorney-Client; Attorney Work Product
9	Document		O'Connell, Maureen		On or before 9/23/09	Draft of talking points, prepared at the direction of counsel, for meetings with government officials	Attorney-Client; Attorney Work Product
10	Document		O'Connell, Maureen		On or before 9/23/09	Draft of talking points, prepared at the direction of counsel, for meetings with government officials	Attorney-Client; Attorney Work Product

## DECLARATION

I, Ellen S. Agress, hereby state as follows:

1. I am Senior Vice President, Fox Television Stations, Inc., licensee of WWOR-TV, Secaucus, New Jersey (the "Licensee").
2. I have read the foregoing Response of the Licensee, dated April 4, 2011 (the "Response"), to the letter, dated February 17, 2011 to Fox Television Stations Inc. from William Lake, Chief, Media Bureau (the "LOI").
3. Except with respect to those portions that rely upon the other Declarations attached to the Response, I have personal knowledge of the facts contained in the Response and declare that, to the best of my knowledge, information and belief, such facts are true and correct.
4. I declare that, to the best of my knowledge, information and belief, Exhibit 2 to the Response contains all of the non-privileged documents in the possession, custody or control of the Licensee that are responsive to Request No. 8. Exhibit 2 also contains a privilege log that identifies all of the documents in the possession, custody or control of the Licensee that are responsive to Request No. 8 of the LOI that are protected by the attorney-client privilege and/or work product doctrine.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2011.



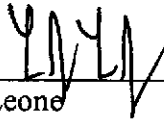
Ellen S. Agress  
Senior Vice President  
Fox Television Stations, Inc.  
1211 Avenue of the Americas  
New York, NY 10036

## DECLARATION

I, Lew Leone, hereby state as follows:

1. I am General Manager of WWOR-TV, Secaucus, New Jersey ("WWOR-TV").
2. I have read the foregoing Response of Fox Television Stations, Inc. ("Fox"), dated April 4, 2011 (the "Response"), to the letter, dated February 17, 2011 to Fox from William Lake, Chief, Media Bureau (the "LOI").
3. To the best of my knowledge, information and belief, the facts contained in the responses to Request Nos. 1, 2, 3, 4 and 5 of the LOI are true and correct.
4. I declare that, to the best of my knowledge, information and belief, the documents enclosed as Exhibit 2 to the Response, which are responsive to Request No. 4 of the LOI, are true and accurate reproductions of personnel records maintained by WWOR-TV in the ordinary course of business. Personally identifiable information, and information as to each employee's salary, have been redacted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2011.



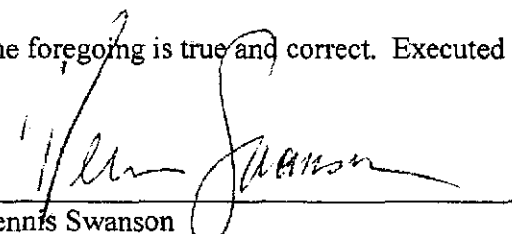
\_\_\_\_\_  
Lew Leone  
General Manager  
WWOR-TV  
9 Broadcast Plaza  
Secaucus, NJ 07096

## DECLARATION

I, Dennis Swanson, hereby state as follows:

1. I am President of Station Operations for Fox Television Stations, Inc. ("Fox"), licensee of WWOR-TV, Secaucus, New Jersey (the "Licensee").
2. I submit this Declaration in support of the Response of the Licensee, dated April 4, 2011, to the letter, dated February 17, 2011 to Fox from William Lake, Chief, Media Bureau.
3. On September 23, 2009, I attended two meetings at the FCC in connection with WWOR-TV's license renewal application, one with Commissioner Clyburn and a member of her staff and the other with a member of the staff of Commissioner Baker.
4. To the best of my knowledge, information and belief, at those meetings: (i) I told the Commission that, as a result of the national financial crisis, WWOR-TV was losing money and could no longer afford to broadcast a full hour of news each day; (ii) I explained that the station had cut its daily newscast from one hour to 30 minutes; (iii) I said that Fox had reduced staff at the station by approximately 35%; and (iv) I said that, even after accounting for these changes, WWOR-TV's news operations lost money.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2011.



Dennis Swanson  
President, Station Operations  
Fox Television Stations, Inc.  
1211 Avenue of the Americas  
New York, NY 10036

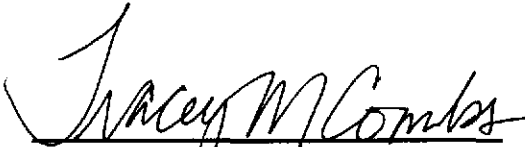
**CERTIFICATE OF SERVICE**

I, Tracey M. Combs, hereby certify that copies of the foregoing filing were sent this 4<sup>th</sup> day of April 2011, via Federal Express, upon the following:

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Tracey M. Combs